IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-1436

SPRAGUE & RHODES COMMODITY CORP., ET AL.,
AMERICAN SMELTING AND REFINING CO.,

Petitioners,

v.

S.S. IRISH SPRUCE, her engines, tackles, etc.,
and IRISH SHIPPING LTD., and
COMPANIA PERUANA DE VAPORES, S.A.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Sprague & Rhodes Commodity Corp., et al. and American Smelting and Refining Company pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in this cause.

Opinions Below

Petitioners seek review of the opinion rendered in the Matter of the Complaint of Irish Shipping Ltd., as owner of S.S. IRISH SPRUCE, for Exoneration from or Limitation of Liability, 548 F.2d 56 (2nd Cir. 1977) (*infra,* Appendix A39). The opinions of the United States Magistrate (now Judge Goettel) and of the District Court (Judge Frankel), not officially reported, are also set forth in the Appendix hereto (A1, A28, A31, A37).

Jurisdiction

The opinion and judgment sought to be reviewed are dated January 17, 1977 and judgment was entered of record on January 17, 1977 (A39, A50).

This being a civil case in admiralty, the District Court jurisdiction was founded upon 28 USC § 1333(1).

The statutory provisions that confer jurisdiction upon this Court to review the judgment in question are 28 USC § 1254(1) and 28 USC § 2101(c).

Questions Presented

The Magistrate (now District Judge) found that the absence of an up-to-date List of Radio Signals was a proximate cause of the loss. The District Judge reviewed the entire proceeding and confirmed this finding. This finding was reversed by the Court of Appeals as a matter of law and therefore presents the following questions:

1. Did the Court of Appeals apply an improper standard to the Carriage of Goods By Sea Act requirement that a vessel owner must exercise due diligence to make his vessel seaworthy?

2. Does the "clearly erroneous" test of F.R.C.P. § 52(a) apply to the Court of Appeals where the Magistrate made a finding of proximate cause which was reviewed by a District Judge and found to be, "persuasive—surely not clearly erroneous"?

Statutory Provisions

The United States Carriage of Goods by Sea Act, 46 USC §§ 1300-1315, is involved in this case. The pertinent portions of this statute are as follows:

"§ 1303. Responsibilities and liabilities of carrier and ship.

(1) Seaworthiness.

The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;"
(USC 1970 ed. Vol. 10, p. 11619)

"§ 1304. Rights and immunities of carrier and ship.

(1) Unseaworthiness.

Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) Uncontrollable causes of loss.

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;"
(USC 1970 ed., Vol. 10, p. 11620)

Statement of the Case

The IRISH SPRUCE loaded cargo in South America destined for United States ports. While enroute to the United States she ran aground in the Caribbean Sea and the vessel and most of her cargo were lost (A1-A3).

The vessel was equipped with a Decca Navigator (an electronic position finding device) which *cannot* be used in the Caribbean area. The vessel was *not* equipped with

Loran (another electronic position finding device) which can be used in this area (A12-A13). The only other electronic means of navigation on the vessel was the radio direction finder. A publication called "List of Radio Signals" contains essential information for the navigator and must be referred to and used in connection with the operation of a vessel's radio direction finder. The vessel was equipped with the 1969 List of Radio Signals. It was not equipped with the up-to-date 1971 List of Radio Signals (A16).

The case was tried by agreement before a Magistrate (now District Judge) (A1). The Magistrate found that the vessel was unseaworthy in two respects: (1) in failing to have the up-to-date edition of the East Coast of Central America and Gulf of Mexico Pilot on board (A15), and (2) in failing to have the up-to-date edition of the Admiralty List of Radio Signals on board (A17); and, that the vessel owners failed to exercise due diligence in not providing the vessel with these navigational publications (A27). The Magistrate found that "the unseaworthy condition" of the vessel in failing to have the current Radio List on board "was an effective cause of the loss. It was a 'proximate cause' . . ." (A25). Limitation of liability was denied and the carrier and the charterer were held liable to cargo for *all* losses and damages resulting from the stranding (A27-A28).

The District Judge "reviewed the entire proceeding", and concluded that the Magistrate's Report was sound and should be sustained. Regarding the question on remand, the District Judge added that the synthesis of the evidentiary materials given by the Magistrate in his resolution of the causation issue was "persuasive—surely not clearly erroneous" (A28, A37).

Despite the factual finding of the District Court upon review that "there were concurring causes in the pertinent sense" (A29), the Court of Appeals reversed and held that no showing of proximate cause had been made as a matter of law.

REASONS FOR GRANTING THE WRIT

1. The decision of the Second Circuit conflicts with decisions of the United States Courts of Appeals for the Fourth, Fifth and Ninth Circuits.

The Second Circuit reversed the decisions of the Magistrate and the District Judge which held that the IRISH SPRUCE, which was not equipped with an up-to-date Radio List, was unseaworthy and that this unseaworthiness was a contributing cause of the stranding.

The Courts of Appeal

The Second Circuit's decision irreconcilably conflicts with the following decisions:

(a) *Waterman Steamship Corporation* v. *Gay Cottons (The Chickasaw)*, 414 F.2d 724 (9th Cir. 1969).

In that case the District Court held that although members of the crew used a radio direction finder which was not equipped with an up-to-date deviation card (correction chart), the condition of the radio direction finder did not cause or contribute to the stranding. The Court of Appeals held that this finding of lack of causation "was clearly erroneous" and said:

> "But the failure to have an 'efficient' radio direction finder is sufficient to deny limitation of liability *if it merely combined with the crew's negligence in using it to be one of the causes of the stranding.*
>
> • • •
>
> How can it be said, except as a matter of pure speculation, that if the finder had worked properly the grounding would still have occurred?
>
> 'The navigation of a ship defectively equipped by a crew aware of her condition does not relieve the owner of his responsibility or transfer unseaworthiness into

bad seamanship.' The Maria, 4 Cir., 1937, 91 F.2d 819, 824." (p. 737) (emphasis added)

(b) *The Maria* (*Gladioli* v. *Standard Export Lumber Co., Inc.*), 91 F.2d 819 (4th Cir. 1937).

In that case the shipowner failed to provide its vessel with charts or other navigational equipment correctly setting out the changed positions of a lightship and a buoy. The vessel stranded and the Court, in finding that the vessel was being navigated in reliance upon the faulty charts and navigation data, held that the shipowner was liable. The Court stated:

> "Our view of the law . . . is that *charts, light lists, and similar navigational data are essential equipment for the safe navigation of a ship,* that she is unseaworthy without them, and it is the duty of her owner to supply them."
>
> and
>
> "The duty of an owner in this respect is nondelegable; and the navigation of a ship defectively equipped by a crew aware of her condition does not relieve the owner of his responsibility or transform unseaworthiness into bad seamanship." (p. 824) (emphasis added)

(c) *Ionian Steamship Co. of Athens* v. *United Distillers of America Inc.*, 236 F.2d 78 (5th Cir. 1956).

In that case Judge Brown stated:

> "It reasoned correctly that if the strandings were caused by unseaworthiness due to lack of due diligence, then it was not an excepted 'loss or damage arising or resulting from' [1] navigational error, [2] stranding or [4] latent defect, [6] any other cause without actual fault or privity, The Folmina, 212 U.S. 354, 29 S.Ct. 363, 53 L.Ed. 546; and *certainly not if*

> *these were merely concurring causes.*" (p. 80) (emphasis added)

(d) *Union Carbide and Carbon Corp.* v. *The Walter Raleigh, et al.*, 109 F.Supp. 781 (S.D.N.Y. 1951), aff'd 200 F.2d 908 (2nd Cir. 1953).

In that case the District Court held:

> "*The carrier has the burden* of showing that the loss was due to one of the excepted causes. Further, the *carrier has the burden* to show that it used due diligence to make the vessel seaworthy for the voyage. American Tobacco Co. v. The Katingo Hadjipatera, D.C. 81 F.Supp. 438. If it appears that there may have been several concurring causes of the damage, the burden is on the carrier to show that it was due to one of the causes excepted under the Carriage of Goods by Sea Act. And if it is shown that more than one cause was an effective and proximate cause of the damage and that one of the causes was the unseaworthiness of the vessel, the fact that the other cause was an excepted cause under the Act does not relieve the carrier from liability. *If unseaworthiness resulting from the carrier's failure to exercise due diligence to make the vessel seaworthy concurs with negligent management of the vessel by the officers, the carrier is liable.* The Temple Bar, 45 F.Supp. 608." (p. 793) (emphasis added)

The Second Circuit affirmed and said: "the district court's finding cannot be held 'clearly erroneous,' as it must be to justify reversal" (p. 910).

The shipowner was liable for the loss in each of the above cases. In *The Chickasaw, supra,* the crew relied upon a radio direction finder which was not equipped with an up-to-date deviation card; in *The Maria, supra,* the vessel was navigated using faulty charts and navigational data. In the instant case the navigator of the IRISH SPRUCE

used and relied on the radio direction finder and an outdated List of Radio Signals because the up-to-date List was not on board.

In *The Chickasaw, supra; The Maria, supra; Ionian Steamship Co. of Athens* v. *United Distillers of America, Inc. supra;* and *Union Carbide and Carbon Corp.* v. *The Walter Raleigh, et al., supra,* it was held that if a condition of unseaworthiness is merely a *concurring cause* of the loss, the shipowner is liable.

The IRISH SPRUCE went aground because it was unseaworthy in that it did not have the 1971 Edition of the List of Radio Signals on board. Both Magistrate (now Judge) Goettel and Judge Frankel held that the absence of the 1971 Edition rendered the vessel unseaworthy and that this unseaworthiness was a concurring proximate cause of the stranding. However, the Second Circuit incorrectly held that "any unseaworthiness which conceivably might be charged to the absence of the 1971 edition cannot be held to have been a proximate cause of the stranding" (A49). The evidence is clearly to the contrary.

The Navigator

Second Officer Healy was the officer on watch at the time of the stranding. Mr. Healy joined the IRISH SPRUCE on June 10, 1971 as Second Officer. He had held a Chief Mate's license since July 1970. He was the vessel's Navigator (A7) and responsible for all charts and nautical publications.

Mr. Healy was the first witness called by the carrier at the trial. The Magistrate heard his testimony; observed his demeanor; examined the documents in evidence including Mr. Healy's Journal; and, concluded that Mr. Healy was "an unusually conscientious navigator" (A18). The carrier itself referred to Mr. Healy's "meticulosity in matters of navigation" (A35).

Mr. Healy's actions, his actual practice, tell it all. An examination of his Journal demonstrates that he was an excellent officer, and particularly so in respect of his careful attention to using available aero radiobeacons in areas which his vessel transited (A34-A35).

The Magistrate considered the issue of causation at length and reviewed the Navigator's past practice with aero radiobeacons. The Magistrate said:

> "As mentioned earlier, Healy had been along this course before. He had used the beacons on Swan Island and Grand Cayman and recorded the signals in his own journal. He turned on the radio direction finder to Swan Island when he came on duty and because he knew it was there, but he did not know of San Andres. When Healy came on watch, the Swan Island beacon was approximately 300 miles away and San Andres only 100 miles. He acknowledged in his deposition that if there was a beacon within range, it would have been of value. It follows that if he would try a station 300 miles away, he would certainly have tried one only one-third that distance.
>
> As all parties acknowledged, Healy was an officer of 'meticulosity in matters of navigation.' (Carrier's Post Trial Brief, p. 12.) His personal journal contains a half dozen references to radio direction finder beacons. (February 8, March 7, July 17, July 26, September 1, October 1.) From his prior performance, plus his testimony, it is apparent that he used radio beacons whenever they were available and necessary. On the prior voyage southward, he used Swan Island and Grand Cayman on October 1, but on October 2, despite overcast skies which prevented celestial sights, no attempt was made to use the RDF as they sailed south from the Quita Sueno and Roncador Bank passage. The obvious explanation for this is that they were out of Swan Island's range and did not know of

the San Andres beacon. Indeed, both Healy and other ship's officer involved in taking navigational sights (Chief Officer Kelly), testified of their inability to find San Andres in the old radio list aboard, either in the index or the geographical listings.

The carrier argues that it is impermissible to draw inferences from such circumstantial evidence. It would be overly simplistic to conclude that, since a prudent navigator should have consulted a new light (*sic.* radio) list to see if there had been additions for the area in which they were sailing, that this navigator would have done so. However, Mr. Healy had placed the order for this new radio list, he testified that he should and normally does use all available aids, and his journal establishes that he had done so in the past. It is not a matter of piling inference on inference as argued by the carrier, but simply whether he would, or would not, have used the San Andres beacon had he had adequate information in order to make use of it." (A34-A35)

Mr. Healy used *listed* aero radiobeacons contained in the 1969 List. The 1969 List contained a specific *warning* that *unlisted* aero radiobeacons were not considered reliable for marine use, and further "warned that the charted position of an Aero Radiobeacon not listed in this volume may be in error". Mr. Healy did not use unlisted aero radiobeacons. This was in accordance with the warning contained in the 1969 List. The superseded 1969 List did not list the aero radiobeacon at San Andres in the alphabetical list of call signals, nor in the geographical index, nor in the alphabetical list of Morse identification signals, nor in the list of radiobeacons (A16-A17).

As contrasted with the outdated List that was on board the vessel, the 1971 Edition lists the *aero* radiobeacon at Isla San Andres with all essential details, including its *power* (one kilowatt), the fact that it is in *continuous* trans-

mission, its call sign, the radio frequency, the exact position of the beacon, and the type of radio emission (A1) that is used (A17). The 1971 Edition also lists the aero radiobeacon at San Andres in the alphabetical list of identification signals and in the alphabetical index of stations (A17).

The Court of Appeals held that "the general organization of this edition (i.e. 1971) was significantly varied from that of the 1969 edition" (A44). Where the old List *discouraged* a navigator from using *unlisted* aero radiobeacons (A16-A17), the 1971 List *encouraged* the navigator to use *listed* ones. That the 1971 edition contains new, important data not available before, is stressed in the preface at page 5 where it states that the principal changes include:

> "(3) All RADIOBEACONS, *including AERO* RADIOBEACONS, are *listed* in *geographical* sequence; all appear in the *Alphabetical* List of Identification Signals and all are numbered." (emphasis added)

The 1971 edition further states on page 13 that: ....

> "Only selected Aero Radiobeacons likely to be of particular use for marine navigation are listed and charted."

Swan Island has an aero radiobeacon and Healy tried to use it. It was *listed* in the 1969 List. How can it be speculated that he would not have used the 1971 List as he had used the 1969 List? To say that Mr. Healy, who used the 1969 List in accordance with the warning contained therein, would not have used the 1971 List and discovered the San Andres listing is *pure speculation.*

The Court of Appeals described the trial court's finding that Healy would have discovered the *listed* San Andres beacon in the 1971 List as a "fortuity". This is untenable in the face of Healy's previous practice with *listed* beacons. There is no reason to doubt that he would have used the *listed* aero radiobeacons in the 1971 List had it been aboard the vessel and found San Andres aero radiobeacon.

What more does cargo have to do to establish unseaworthiness as being a concurring cause?

The Trial Court

The Magistrate correctly found that the absence of the up-to-date Radio List was an unseaworthy condition which "was an effective cause of the loss. It was a 'proximate cause' . . ." (A25). The District Judge affirmed the Magistrate and said:

> "The Magistrate followed a correct conception of the applicable law in his analysis of the causation issue. . . . *There were concurring causes in the pertinent sense.*" (A29) (emphasis added)

The District Judge also correctly stated:

> "Absence of the revised list deprived the ship of the information which was available and which it needed to be reasonably equipped to carry out its services." (A29)

The Magistrate properly found that "the beacon on San Andres would have provided an excellent 'danger bearing' "; and, that "a danger bearing of 205°T. or greater could have been used, and if maintained would have kept the vessel out of danger" (A20).

The IRISH SPRUCE was not equipped with LORAN (electronic position finding device). Star sights could not be taken because of overcast and rainy weather. The only other useful electronic navigational aid was the radio direction finder. It is "pure speculation" to say that if the vessel had been properly equipped with the 1971 List "the grounding would still have occurred". *Waterman Steamship Corporation* v. *Gay Cottons (The Chickasaw), supra.*

Unseaworthiness Versus the Public Interest

In years past this Court played a most important role in the development of the Law of Admiralty. It consistently acted where the Legislature had failed to act and, as a result, nurtured that body of law known as the General Maritime Law. This Court ruled on maritime questions, filled in gaps where necessary, and interpreted statutes, such as the Carriage of Goods by Sea Act, which affected our national growth and had substantial impact on international commerce and trade.

It has been many years since the Supreme Court has considered a cargo owner versus ship owner case. Cargo versus ship issues have again become of *national importance* because of the increased importation of cargoes, particularly oil, to the U.S. and the resulting environmental problems. On her last voyage the unseaworthy and ill-equipped IRISH SPRUCE was heading for United States waters.

The ARGO MERCHANT loss off Nantucket in December 1976, and other recent maritime casualties off the coast of the United States point out the urgent *need* for such vessels to be maintained in a seaworthy condition. The problems of a lost cargo have become much more serious and alarming because of the larger size of vessels and the potential pollution damage to adjacent coastal shores, fish, wildlife and property belonging to others.

The Carriage of Goods by Sea Act requires the owners of vessels trading to the U.S. to exercise due diligence to make their vessels seaworthy. But this requirement will not be met if the Courts fail to apply the proper standard. Most foreign vessels are not subject to the same inspection standards that the U.S. Coast Guard imposes on U.S. vessels. Because of cost cutting and haphazard management many ships are not maintained in a seaworthy condition and will not be unless the Courts require that the proper standard be adhered to.

2. The Court of Appeals' reversal of the finding of proximate cause by the Magistrate and by the District Judge is improper under the "clearly erroneous" test of F.R.C.P. 52 (a).

Rule 52 (a) of The Federal Rules of Civil Procedure states in pertinent part:

> "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court * * *."

The case was tried before a Magistrate (now District Judge) *by agreement.* The Magistrate heard the testimony of the Navigator (Mr. Healy) and concluded that he was "an unusually conscientious navigator," and that "Had he had the revised list on board, I find that he would have examined it, determined the availability of the radiobeacon, and used it" (A18). The Magistrate considered the evidence that the Navigator previously used aero radiobeacons listed in the 1969 List and that the 1969 List contained a specific warning that *unlisted* aero radiobeacons were not considered reliable for marine use. In short the evidence showed that the Navigator did *not* use *unlisted* aero radiobeacons.

Unlike the 1969 List, the revised up-to-date 1971 List did list the aero radiobeacon at San Andres in all the appropriate places in the *text* of the book. Moreover, the 1971 List encouraged a navigator to use listed aero radiobeacons. Based on the above evidence the Magistrate concluded that the Navigator would have used the 1971 List and employed the aero radiobeacon at San Andres. In other words, the Magistrate concluded that the Navigator would have used the 1971 List, if it had been aboard, in the same manner that he used the 1969 List, as established by his actual practice, i.e., he used listed aero radiobeacons and he did *not* use unlisted aero radiobeacons.

The Court of Appeals reversed, holding that there was no showing of proximate cause as a matter of law. The Court of Appeals further held that even if the Navigator "would have studied the 1971 edition and found in it what he had overlooked in the 1969 edition * * *, any unseaworthiness which conceivably might be charged to the absence of the 1971 edition cannot be held to have been a proximate cause of the stranding," and that this "fortuity, however, has nothing to do with proximate cause" (A49). In essence the Court of Appeals concluded that the Navigator would not have used the 1971 List the same way that he used the 1969 List, as established by his actual practice.

Such reasoning will not produce an incentive to maintain vessels in a seaworthy condition. This interpretation of COGSA defeats the purpose of the statute.* Such a strained interpretation literally requires a showing of the state of mind of the Navigator in order to establish that any unseaworthiness caused or was a concurring cause of the loss. The Court of Appeals ignored the evidence that the Navigator *did* use available aero radiobeacons that were listed in the outdated 1969 List of Radio Signals and the evidence that the old 1969 List contained a specific warning that *unlisted* aero radiobeacons were not considered reliable for marine use. There is no evidence to the contrary. The Court of Appeals simply concluded that the Navigator failed to make full use of the old 1969 List because it had a chartlet in the back indicating the presence of the San Andres aero radiobeacon and ignored the important changes that had been made in the revised up-to-date 1971 List concerning aero radiobeacons in general and the beacon at San Andres in particular.

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* Indeed it throws out of balance the division of risk sharing between vessel and cargo that was the basis for the "Hague Rules" Convention which the United States adhered to and which was implemented by Congress in passing the Carriage of Goods by Sea Act in 1936. *The Law of Admiralty* by Gilmore & Black, (2nd Ed.), pp. 142-144.

The matter of causation was twice considered by the Magistrate and twice considered by the District Judge. After the second review the District Judge "concluded that the Supplemental Report is sound and should be sustained" (A37). The District Judge added that the synthesis of the evidentiary materials given by the Magistrate in his resolution of the causation issue was "persuasive—surely not clearly erroneous" (A38). The finding of proximate cause by the trial court (in this case two judges) is factual and supported by the evidence. It is governed by the "clearly erroneous" test of F.R.C.P. 52(a) and should not be reversed by the Court of Appeals. *McAllister* v. *United States,* 348 U.S. 19 (1954).

One choice between two permissible views of the evidence is not clearly erroneous, *United States* v. *Yellow Cab Co.,* 338 U.S. 338, 342 (1949). In *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100 (1969) this Court said:

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo.* The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52 (a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.' *United States* v. *United States Gypsum Co.,* 333 U. S. 364, 395 (1948). See also *United States* v. *National Assn. of Real Estate Boards,* 339 U. S. 485, 495-496 (1950); *Commissioner* v. *Duberstein,* 363 U. S. 278, 289-291 (1960)." (p. 123)

In *Lavender* v. *Kurn,* 327 U.S. 645 (1946), this Court commented:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. • • • And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (p. 653)

The circumstances under which the decision of the Magistrate was rendered and approved by the District Judge further support affirmance in the absence of clear error. The case involves a stranding. Before the Magistrate were many issues touching upon navigation, including what information a navigator needs to utilize as well as existing scientific electronic means of determining a vessel's position. Magistrate Goettel (now Judge Goettel) was previously a navigator in the U.S. Coast Guard and was, therefore, uniquely qualified to evaluate the evidence and competence of the navigator who appeared as a live witness (A13).• Mr. Justice Jackson addressed such a point in *Graver Tank & Manufacturing Co.* v. *Linde Air Products Co.,* 339 U.S. 605, 610 (1950):

> "Like any other issue of fact, final determination requires a balancing of credibility, persuasiveness and weight of evidence. It is to be decided by the trial court and that court's decision, under general principles of appellate review, should not be disturbed unless clearly erroneous. Particularly is this so in a field where so much depends upon familiarity with specific scientific problems and principles not usually contained in the general storehouse of knowledge and experience."

Underlying the determination that the absence of the 1971 List was a concurring cause of the loss was the major

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•"And there comes a point where this Court should not be ignorant as judges of what we know as men." *Watts* v. *Indiana,* 338 U.S. 49, 52 (1949).

finding of fact of what the navigator would have done had the new 1971 List been on board. This Court has stated that primary weight ought be given the determination made by the trier of fact where, as here, the issue is "based ultimately on the application of the fact finding tribunal's experience with the mainsprings of human conduct to the totality of the facts" of the case. *Commissioner of Internal Revenue* v. *Duberstein,* 363 U.S. 278, 289 (1960).

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Dated: New York, N. Y., April 15, 1977.

Respectfully submitted,

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Special Master's Report.

IN THE MATTER OF THE COMPLAINT OF IRISH SHIPPING LTD., PLAINTIFF, AS OWNER OF THE S.S. IRISH SPRUCE, FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

AMERICAN SMELTING AND REFINING COMPANY,

Plaintiff,

v.

S. S. IRISH SPRUCE, ETC.,

AND

IRISH SHIPPING LTD.,

Defendants.

SPECIAL MASTER'S REPORT.[1]

GERARD L. GOETTEL, U.S. Magistrate:

The wreck of the S/S *Irish Spruce* lies on the remote Quita Sueno Bank in the western Caribbean, 120 miles east of the coast of Nicaragua. Quita Sueno means "troubled sleep", and that is about all that remains for the once proud *Irish Spruce.*[2] When she ran aground at 3:29 a.m. on January 27, 1972, the vessel and most of its cargo were

[1] These cases were referred by Order of Judge FRANKEL dated January 25, 1974, for hearing and report upon the consent of the parties.

[2] The *Irish Spruce* was a dry cargo vessel registered under the laws of the Republic of Ireland. She was built in England in 1957 and held in the highest class of hull and machinery of Lloyd's Registry of Shipping. Her length overall was 449 feet. Her extreme breadth was 62 feet 3 inches. Her registered gross tonnage was 7,875 and her net tonnage 4,555. Her maximum sea speed was 16 knots.

Special Master's Report.

lost.[3] (Fortunately, there were no injuries among the crew—all of whom were saved.) This action seeks to find why the *Irish Spruce* stranded.[4]

Contentions of the Parties.

The owner and operator, Irish Shipping Ltd.[5] ("owners") seek exoneration from liability for the lost cargo, contending that the vessel was lost due to navigational error, which is a statutory exemption under the Carriage of Goods by Sea Act, 46 U. S. Code, sec. 1304, or a limitation of liability under 46 U. S. Code, sec. 183, as being incurred without the privity or knowledge of the owner.

The cargo claimant[6] ("cargo") contends that the loss was not due to navigational error, but that, even if it *were,* the navigational error was either caused or contributed to by the owner's failure to exercise due diligence to make the vessel seaworthy (thereby making them liable), citing, *inter alia, Waterman Steamship Corp.* v. *Gay Cottons,* (*Chickasaw*), 1969 AMC 1682, 414 F.2d 724 (9 Cir., 1969); *Avera* v. *Florida Towing Corp.,* 1963 AMC 2110, 322 F.2d 155 (5 Cir., 1963); *Cleveco,* 1946 AMC 933, 154 F.2d 605, 613 (6 Cir., 1946).

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[3] Some of the cargo was salvaged and eventually taken to New Orleans. The vessel was sold "as is" and "where is" for $15,000.

[4] The case was tried on liability only with the assessment of damages, said to be in excess of $2,000,000, reserved for subsequent adjudication if necessary.

[5] Irish Shipping Limited is a corporation organized and existing under the laws of the Republic of Ireland.

[6] Claimant Sprague & Rhodes Commodity Corp., et al. in 72 Civ. 3199 and plaintiff American Smelting and Refining Company in 72 Civ. 656 are corporations and business organizations which were the owners of the cargoes laden on board the *Irish Spruce* when that vessel stranded, or are underwriters of such cargoes which, by reason of their payments, have become subrogated to the rights of such owners.

Special Master's Report.

Also involved is a time charterer, Compania Peruana de Vapores,[7] against whom the cargo interests have filed claims. The charterer supports the shipowners' position that the cause of the loss was an exempted peril, but, contingently, claims indemnity from the shipowners in the event that it is found that their failure to exercise due diligence to make the vessel seaworthy caused the loss. (The charterer also seeks the value of its bunkers, stores and equipment aboard the vessel at the time of the stranding.)

The Final Voyage.

The fateful voyage of the *Irish Spruce* commenced from ports on the west coast of South America in January of 1972. The ship was carrying cargo destined for New Orleans and other United States Gulf ports. She passed through the Panama Canal on January 25, 1972. Between the Panama Canal and the Gulf of Mexico lies the western part of the Caribbean Sea, filled with treacherous shoals and reefs. Despite the heavy marine service through these waters, these hazards to navigation are poorly marked and inadequately serviced.[8]

From the Canal to the Yucatan Pass (which lies between Cuba and Mexico), there are several possible courses. One recommended course is to pass between Roncador Bank and Serrana Bank to the East and Isla San Andres, Isla de Providencia and Quita Sueno Bank to the West. This was the general course chosen by the Master and

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[7] Compania Peruana de Vapores is a business entity organized and existing under and by virtue of the laws of the Republic of Peru, and the cargo laden on board the *Irish Spruce* was carried pursuant to the bills of lading provided by Compania Peruana de Vapores and signed by the Master.

[8] The uninhabited reefs mentioned herein belong to the Republic of Colombia and the navigational aids thereon are maintained by it.

navigator of the *Irish Spruce*. The peril involved in this route is that the passage between Quita Sueno Bank and Serrana Bank is only 45 miles wide, and the lighthouses thereon have a maximum visibility of eleven or twelve miles. The earlier reached light on Roncador Bank is also weak and low-lying, providing a poor radar target.[9] In addition, the Quita Sueno light is on its northerly approach and the Bank stretches for some 25 to 30 miles to the south, so that a vessel can easily strand on its south reaches before picking up the light.

The passage resembled a capital "A", with the top being a point between Jamaica and Honduras that the vessel was proceeding towards, to set off through the Yucatan Pass, and the bar across the A being the 45 mile passage, and the bottom corners being Providence Island and Roncador Bank. A 45 mile passage will ordinarily leave a sufficient margin for navigational error and unexpected currents, providing that the vessel has an accurate point of departure within 100 or 150 miles and the maximum width of the passage is utilized. Unfortunately, however, neither of these situations existed.

The recommended course pursuant to the American Sailing Directions (which was not consulted for reasons which will be subsequently explained), is a more westerly route along the Isla San Andres (St. Andrews Island) and west of Providence Island, keeping Quita Sueno Bank well to the east. Although this route is a little longer, both of the islands have sufficient altitude to provide excellent radar targets as well as better lights and navigational aids. A third possible route proceeds slightly east of north from the Canal, keeping all reefs well to the west. This route is not recommended in any sailing

[9] Had the projected course been further to the west there would have been the possibility of obtaining radar ranges off Providence Island which has a maximum elevation of 1190 feet.

directions, apparently because it is longer and there are no navigational aids along it.

Leaving the Canal on the projected course recommended by the British Admiralty Pilot, the vessel intended to steer a course almost due north. (Even that course would not have given as wide a leeway as a course of 350° True ("T.") which would split the broad part of the channel between the Quita Sueno and Serrana Banks.) Unfortunately, shortly after leaving the Canal in the early morning hours on January 26th, the vessel encountered rough seas and heavy swells and changed her course to the east to ease the rolling.[10] As the weather eased during the afternoon, further course changes were made. A result of these changes was to cause the *Irish Spruce's* projected angle of passage between the two banks to necessarily be more diagonal, so that the vessel would pass within eight miles of the light on Roncador Bank and within seven miles of the light on Quita Sueno.

An even more unfortunate development occurred with respect to the obtaining of celestial navigational fixes. No position had been obtained at dawn. A noon position had been obtained by taking a sun line and advancing the morning position line. While the Navigator (Second Officer Healy) felt confident of the accuracy of this position, it was based on a form of running fix (which depends in part upon the accuracy of the dead reckoning since the time from which the morning line was advanced) and was taken in fairly heavy seas, which also reduced its reliability. Moreover, as the First Officer was taking his sights on the evening stars (the most accurate navigational aid), rain squalls obscured his horizon. Questioning

[10] A possible reason for the course change in what were not really extreme conditions was that the vessel had some precious supercargo; the wives of the Captain and the Chief Engineer. Perhaps out of gallantry, neither side made any reference to this.

the accuracy of the observations already made of three of seven selected stars, the First Officer did not even bother to plot the starlines. The vessel then set its course at a heading of 330° T., hoping to pick up the light on Roncador Bank at 2300 hours.[11]

The lonely rendezvous was never made. The light was not seen nor were any radar targets observed. The vessel plowed on the same course at full sea speed for an additional hour. At midnight the Captain had to make a decision. He could attribute the failure to pick up the Roncador Light to its weakness and to the fact that heavy showers in the area might have obscured the light from radar had they been only a few miles off course.[12] But he also had to contend with the fact that there had been no navigational fixes for twelve hours, and that only a noon position; he was attempting to pass between treacherous banks at a poor angle; he did not believe that there were any radio beacons in the area worth using (a key point to be discussed later); there were neither navigational aids nor radar targets ahead for the next fifty or sixty miles (until Quita Sueno Light); the depth sounder (fathometer) was useless since the vessel was in deep water and the banks shoaled so rapidly as to provide little warning of their presence; the vessel's electronic position-finding equipment, the Decca navigator, was useless in those seas

[11] Despite the fact that they were already far east of their projected course, apparently no consideration was given to the possibility of continuing on a northerly course steering well to the east of Roncador and Serrana Banks on open seas; this would not have required a course change to more dangerous waters until daylight hours and, from the vessel's then assumed position, would have been only slightly longer.

[12] The light on Roncador is a pyramidal framework, a type difficult to contact by radar because it is not solid and because the angles of its side tend to diffuse the radar impulse skyward rather than back to the radar. It was not equipped with a radar reflector.

since there were no stations for thousands of miles; and the vessel was not equipped with loran[13] (another point to be considered later). Nevertheless the Master (Captain Kerr), who was on the bridge, decided to alter course further to the West to 323° T., hoping to ultimately pick up Quita Sueno Light. Full speed was maintained and the vessel was kept on automatic pilot.

The Navigator, Second Officer Healy, came on watch at midnight and was advised by the Captain of the decision made. The Captain remained on the bridge during the rest of the night. The only other person on watch was a seaman look-out. By this time the weather had improved, the seas abated, and the moon was shining much of the time. At 0230 hours, the radar picked up a target slightly off the starboard bow and at a range of 15.9 miles. The continued plotting of a fix on this target over the next half hour suggested that it was stationary. Although they had come now within sufficient range to see the lights, if it were another vessel, nothing was observed. The Master knew that there were no charted wrecks or reefs in the position of the target. Consequently, he assumed that the mysterious radar target was a seagoing fishing boat lying dead in the water without lights. He continued at full speed while continuing to plot its relative bearings.

At 0329 hours (when the unlighted object was only a few miles away) the Captain observed that the fathometer had suddenly recorded a sharply rising bottom, and that they had already passed over a reef only seven feet below

[13] The *Irish Spruce* was equipped with various electronic and other navigational instruments including radar, radio direction-finder, fathometer, gyro- and magnetic compasses, automatic pilot, and course recorder. Most of the electronic equipment was rented from Marconi International and was serviced by their employees when the vessel was in an Irish or English port. Marconi technicians could also be called upon when needed in other parts of the world.

the keel. At the same time, the look-out and navigator saw surf breaking ahead. The engines were reversed, but in a matter of seconds the *Irish Spruce* had become impaled on the shoals of Quita Sueno Bank. The dawn's light revealed that the radar target had been a wreck which they believed to be some twenty-five miles to the west. On the annexed chart the line from A to B represents the projected course. The line from C to D represents the revised course, with "M" at the midnight dead reckoned position. The line from E to F represents the actual course of the *Irish Spruce* during its last hour, based on radar ranges, with "X" marking the point of stranding.[14]

Why the *Irish Spruce* was so badly off course is a matter of speculation. While a failure of some of the navigation equipment such as the automatic pilot cannot be entirely discounted, all of it had been tested when passing through the Panama Canal and found to be in working order.[15] It is generally thought, and was the opinion of the Captain, that the vessel had been carried twenty-five miles to the west by a strong current. About the only thing the parties do agree upon is this point. It is the failure of the vessel to anticipate and to observe this set and drift that is the main issue of contention.

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[14] The chart contains both an X and a circled X. The circled X marks the charted position based on this British chart's position of the radar-conspicuous wreck: Lat. 14°16′N., Long. 81°10′W. (The wreck appears on this chart at the top right hand corner of the uncircled X.) The uncircled X represents the position of the vessel as revealed by several subsequent sights taken later by the navigator indicating the radar-conspicuous wreck to be in a different position. The U. S. charts show the wreck as being at 14°16½′N. and 81°8′W. Although the U. S. chart appears more accurate in this respect, it was not a significant factor in the stranding.

[15] The ship's gyro had an error of 1½° which was said to vary. Only a 1° correction was used. While this could produce some deviance over a prolonged period of dead reckoning, it was not sufficient to explain such a drastic difference.

Errors in Navigation.

It is quite apparent that the immediate cause of the stranding was imprudent navigation. The original route selected, of those available, seems to be the most dangerous. When the ship changed course because of the high seas, she went well to the east of the originally projected course, and when the First Officer was unable to get a position from the evening stars, he ran a serious risk in plotting a diagonal course through the passage. The crucial errors did not occur, however, until midnight when the ship had failed to pick up the light on Roncador.

The dead-reckoned position put the vessel within nine miles of the light. Although the Captain dismissed the failure to pick up the light either visually or on radar because of the rain squalls in the area, this merely indicates the imprudence in plotting a new course further westward. Captain Kerr acknowledged in his deposition that "• • • the navigational aids in this part of the world are very poor • • • it is not a very good part of the world for navigation". He admitted that from 2300 hours on "I was not sure where I was so I decided to run on for awhile to get a few more miles to be on the safe side". When asked what he meant by being "on the safe side", he replied "to avoid any reefs".

The Captain had to know at 2400 (midnight) that he was at least somewhat off his course. He had not had any celestial navigation fixes for 12 hours (and that only a noon position) and he had been essentially dead reckoning for almost 24 hours. Since he was off his course, he could reasonably assume that he was neither north or east of it, since in either of those instances he would have picked up (or run aground on) Roncador Bank. Consequently, he had to be either south or west of his dead-reckoned position. He attempted to cover the possibility of being south by continuing on course for an extra hour from 2300 to

2400, but this was unavailing. It should have seemed almost certain, therefore, that he was to the west of his intended course. Regardless of whether he was west or south, if he was as much as ten miles off course (which should not have been surprising in view of the currents in those waters and the length of time since a reliable position had been obtained), the course change to 323° T. was certain to take the vessel over the Quita Sueno Bank. In light of what developed, it would appear that, if he had simply continued on the original course of 330° T., that slight difference would have been sufficient to have sighted the Quita Sueno light on the northern part of the bank before stranding.

All of the expert testimony agreed that it was imprudent navigation to alter course at midnight to 323°. Indeed, even the vessel's navigator, Second Officer Healy, acknowledged that while he thought the navigation to be prudent at the time, having subsequently heard the expert opinions and having studied the situation (but without taking into account the hindsight advantage of knowing what actually occurred), he could now see that it was not prudent for the vessel to have continued on as it did.

There is some doubt in the experts' opinions as to what would have been prudent navigation at that time. One opinion is that the vessel should simply have hove to, put out a sea anchor and awaited the dawn. Another option suggested was that she should have sailed westward in the hope of getting radar ranges off Providence Island. At the very least, a more northerly course should have been adopted. While Serrana Bank lay to the north of the assumed position, its light is at the southern part of the bank (as contrasted to Quita Sueno where the light is at the extreme northern end). Moreover, the light on Serrana Bank is higher and has a greater radar range. According to the current American Sailing Directions, it has a radar reflector. (Chapter #12, p. 147.) Consequently,

had a more northerly heading been maintained it would have accounted for most contingencies, almost certainly preventing the stranding of the vessel.

Finally, in light of the vessel's situation, the assumption during the last hour of cruising that the target picked up was merely an unlighted fishing vessel was extremely imprudent. Some thought should have been given to the possibility that it was a radar-conspicuous wreck and that the vessel was badly off course. This apparently did not even cross the mind of the Captain. If the earlier errors cannot be classified as imprudent navigation, certainly those of this last hour clearly qualify as such. The owners have proved that the immediate cause of the loss of the *Irish Spruce* was the navigational errors of her officers, thereby entitling them to exoneration from liability, *Murray* v. *New York Central RR Co.*, 1961 AMC 1118, 287 F.2d 152 (2 Cir., 1961), *cert. den.*, 366 U. S. 945, 1961 AMC 1923 (1961); *Temple Bar*, 1942 AMC 1125, 45 F. Supp. 608 (D. Md. 1942), *aff'd.* 1943 AMC 939, 137 F.2d 293 (4 Cir., 1943), unless an unseaworthy condition contributed to the loss.

Unseaworthiness.

Cargo claims that the *Irish Spruce* was unseaworthy in several respects. These defects largely arise from the fact that the *Irish Spruce* was equipped with British electronic position finding equipment (a Decca Navigator), and with British Admiralty publications. The vessel was not equipped with an American loran electronic position finding device, nor with a complete set of American nautical publications and charts.

The explanation given for the outfitting of the vessel was that she was constructed in the British Isles and is overhauled there. However, during most of her years of service the *Irish Spruce* was in American waters, as indeed were most of the vessels of Irish Shipping Limited.

A. *Loran.*

The Decca Navigator was of no value whatever in United States and Caribbean waters since there were no transmitting stations for thousands of miles and its range is relatively short. While the loran coverage in the area of the stranding is marginal, the evidence established that nighttime fixes could be obtained with reasonably good intersecting angles.

There has been a judicial reluctance to find that the failure to employ the major electronic navigational aids (even radar, which is almost universally used by seagoing and coastwise vessels of all sizes) constitutes an unseaworthy condition, although the courts have been willing to consider the inoperability of radar aboard as unseaworthiness. *Compania Naviera Epsilon, S.A., Lim. Procs. (Nicolaos S. Embiricos),* 1974 AMC 2608 (S.D.N.Y., 1973) *aff'd.* without opinion, 1974 AMC 2609, 506 F.2d 1395 (2 Cir., 1974). Fourteen years ago Judge MEDINA, in *Afran Transport Co.* v. *The Bergechief,* 1960 AMC 1380, 274 F.2d 469 (2 Cir., 1960), indicated that sooner or later radar would be required. A similar statement was made in *President of India* v. *West Coast Steamship Company,* 1963 AMC 649, 213 F. Supp. 352 (D.C. Or. 1962), *affirmed* 1964 AMC 1500, 327 F.2d 638 (9 Cir., 1964), *cert. den.* 377 U. S. 294, 1964 AMC 1925 (1964), with respect to both radar and loran.

Owners contend that, while there is considerable argument for requiring radar on seagoing vessels (see e. g., *Radar and the New Collision Regulations,* 37 Tulane Law Review 621 (June 1963)), radar and loran are not comparable since radar can be used anywhere in the world, while loran is confined to those areas having loran coverage. There is, in fact, loran coverage throughout most of the northern hemisphere and considerable parts of the Pacific. BOWDITCH, *American Practical Navigator,* p. 332, *British Pilot,* p. 13. Radar is, of course, extremely valuable in coastwise cruising but on the open seas has little navigational value except to avoid collisions with other ships.

It appears proper in admiralty cases for the finder of fact to use his own knowledge of navigation and seamanship acquired by personal observation and experience.[16] *Eleanore,* 248 Fed. 472, 473 (6 Cir., 1917). From this I can say, without hesitation, that the equipping of the vessel with a Decca Navigator useful only in the area of the British Isles rather than a loran receiver, which would have been of value to the vessel during all of its voyages since its last drydocking, denied the vessel the most valuable deep sea electronic navigational aid in wide usage at the time of stranding.[17]

Despite my strong personal belief concerning the value of loran, and the error of the shipowners in failing to equip the vessel with it, this would appear to be an inappropriate case in which to venture into perilous legal seas with inadequate appellate guidance. Moreover, the absence of loran was not set forth as an issue in the pre-trial order in this case. There was no full evidentiary hearing. No expert testimony was presented concerning the essential nature of such equipment. Consequently, the absence of loran (and the presence of the totally useless Decca Navigator) will not be considered an element of unseaworthiness. However, this situation does stress the need for making maximum use of the remaining electronic navigational aids aboard the vessel.

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[16] The undersigned was for a couple of years a navigator in the U. S. Coast Guard, for a short period the Commanding Officer of two loran stations, and also spent two summers as a merchant seaman.

[17] Expert testimony established that loran is being replaced by a new system called "Omega" which will provide world-wide coverage when fully operational.

B. *British Navigational Publications.*

While the British Admiralty navigational publications are considered, overall, among the world's best (if not *the* best), it was established that the publications of the nation whose waters or trade routes are involved (these routes were between the U. S. administered Canal Zone and U. S. Gulf ports) are likely to be the most current and accurate. The courts, however, have not required vessel owners to supply the navigational publications of all countries, or even of those closest to the area being transitted. *The Temple Bar, supra; M.S. Nicolaos S. Embiricos, supra.* But the failure to supply complete American nautical publications, despite the fact that this vessel, like most of the Irish Shipping, Ltd. vessels, was operating mainly in American waters, certainly emphasizes the need for keeping the British Admiralty Publications completely up-to-date.

The responsibility of the owner is to supply the necessary navigational publications so that the ship may be properly navigated:

> "Our view of the law, now that the point has been definitely raised is that charts, light lists, and similar navigational data are essential equipment for the safe navigation of a ship, that she is unseaworthy without them, and it is the duty of her owner to supply them. Such documents of course become sources of information for the navigator, and the task of securing them is often delegated to officers of the ship. Failure to supply adequate information or navigation without it may thus constitute negligent navigation or management for which they are chargeable; but it does not follow that the owner is thereby relieved by the Harter Act from liability from ensuing disaster, because the same circumstances may also amount to failure on his part to use due diligence to make his vessel seaworthy. The duty of an owner in this respect is nondelegable;

> and the navigation of a ship defectively equipped by a crew aware of her condition does not relieve the owner of his responsibility or transform unseaworthiness into bad seamanship." *Maria,* 1937 AMC 934, 942-43, 91 F.2d 819, 824 (4 Cir., 1937).

C. *The Sailing Directions.*

The British Admiralty Sailing Directions, with which the *Irish Spruce* was equipped, was the *West Indies Pilot,* 11th Edition, 1956, including a supplement. This had been superseded by the first edition of *The East Coast of Central America and Gulf of Mexico Pilot* issued in 1970. This newer volume contained revised current information and contained the following "current caution" with respect to the Quita Sueno Bank:

> "caution should be exercised when passing eastward of Quita Sueno bank as the current here sets strongly to the westward and on the bank."

This caution had apparently been derived from earlier American sailing directions. The 1970 edition of the *Pilot* had been ordered by the vessel months earlier but had not been received. (This aspect is discussed later in the section entitled "Due Diligence".)

Captain Kerr testified on deposition (he did not testify at trial) that he was surprised at the extent of the westerly set of the current, and that he "would have allowed a certain number of degrees to counteract the current" had he anticipated it.

Although the new *Pilot* had been ordered, the failure to have it aboard the vessel in those waters, and without the U. S. publications, constituted an "unseaworthy condition" in the legal sense. *W. W. Bruce,* 1938 AMC 232, 94 F.2d 834, 838 (2 Cir., 1938); *Maria, supra.* However, this unseaworthy condition does not appear to have been a material

cause of the stranding. The radar ranges taken during the last hour of the vessel's voyage do not indicate any strong set westward as the vessel was approaching Quita Sueno Bank. It appears much more likely that the vessel had been encountering a westward set for twelve or more hours prior to running aground. Indeed, considering the seas and wind conditions earlier the preceding day, there is a likelihood that the vessel had been set to the west of her noon position. This, not an unusual current found near the Quita Sueno Bank, seems responsible. The failure to anticipate the strong local current was, at most, only a small contributing factor to the loss.

D. *The List of Radio Beacons.*

The matter of the List of Radio Signals aboard provides a much more difficult question. The *Irish Spruce* had aboard the *Admiralty List of Radio Signals,* Vol. 2, published in 1969. This had been superseded by the 1971 list. The 1969 list did not reveal that there was an aerial radio beacon on Isla San Andres (St. Andrews Island) that would be a valuable marine aid. The new volume, which was also on order, gave all of the details concerning the radio beacon on Isla San Andres. This information was also apparently acquired from the American list of signals. Cargo strongly argues that the failure to have the current list constituted an unseaworthy condition.

The owner has a number of responses to this. Initially, it asserts that the superseded publications on board were sufficient to alert the Captain and navigator to the existence of the radio beacon and to encourage them to use it. In a chart in the back of the 1969 list there is an indication of an aerial radio beacon on San Andres. But the beacon was not listed in the alphabetical list of call signals beginning on page 17, nor in the geographical index beginning on page 10, nor in the alphabetical list of Morse identification signals beginning on page 77, nor the list of radio beacons beginning on page 86. Moreover, neither the power of the beacon nor the fact that it was in continuous transmission are shown on the chart and the volume contained a warning that unlisted aero beacons were not considered reliable for Marine use.[18]

On the other hand, the 1971 edition lists the radio beacon at San Andres in detail, giving its Morse identification signals, listing it in the alphabetical index of stations and, most important, setting forth its power (one kilowatt) and the fact that it is in continuous transmission. Moreover, the new volume indicates that a beacon of one kilowatt may be expected to be usable, under good conditions, up to a range of 240 nautical miles. Under these circumstances, I find that the list aboard was inadequate to alert a reasonably prudent navigator to the possible use of this navigational aid. *The W.W. Bruce, supra.*

A second argument of the owners is that, since Captain Kerr indicated some knowledge of the existence of the station, he would not have been inclined to use the new list even had it been on board. The fallacy in this argument is twofold. In the first place, Captain Kerr's knowledge of the beacon was extremely limited and, in great part, incorrect. In his deposition he acknowledged that he did not know the range or power of the beacon, but that he had been told that it was quite weak. Actually, it was not weak. Had Captain Kerr had accurate knowledge of the beacon's capability, it is quite possible he would have used it. In any event, his generalized indication that he would not have used the beacon (testimony intended to relieve his employers from liability) is not binding nor even particularly

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[18] The evidence established that, while not all radio beacons installed primarily for aircraft are suitable for marine use, those on an unobstructed coast or small island (such as San Andres) are not only suitable but often superior for marine use. (They are usually newer and stronger than marine beacons.)

persuasive. Had Captain Kerr testified at trial this issue could have been better explored. Moreover, Kerr was not the only officer aboard. The Chief Officer had testified that, if he had known about the beacon and could have determined its capacities from the index or geographical index, he would have used it. While the Captain had ultimate responsibility for the navigation of the vessel, initial responsibility rested upon the navigator, Second Officer Healy. His testimony was that he was *not* aware of the radio beacon on the Isla San Andres, and that he would have used it had he been aware of it. While Mr. Healy is relatively young, he appeared to be an unusually conscientious navigator. Had he had the revised list on board, I find that he would have examined it, determined the availability of the radio beacon, and used it.

The owner's final position on this issue is that, even had the ship attempted to use the San Andres beacon, it would have been of no value for navigational purposes. This position has a number of components. The owners first argue that there was no proof that the beacon was in operation on the particular evening in question. The evidence showed that it had been in continuous transmission prior to that time, that it was in continuous transmission thereafter. There was no proof that any warnings to navigators were issued showing that the beacon had been out of operation at any time. Under these circumstances, there is sufficient evidence to find that the beacon was in operation on the night in question.

Next the owners argue that they were out of the effective range of the beacon during the critical period. During the eight hours prior to the stranding, the vessel's assumed position was slightly more than a hundred miles away from the Isla San Andres radio beacon, running almost perpendicular to it. At the time of stranding, she was actually only 105 miles from the beacon, indicating that at the time

of the crucial midnight decision she was less than 90 miles away.

The owners argue that, because of night effect and local weather conditions, the range of the beacon would not have been sufficient. Night effect, however, is primarily a phenomenon of the sunrise and sunset hours when there is ionospheric disturbance. During the nighttime hours involved, little of this effect would have been experienced. Even under bad weather conditions, the evidence established that the beacon was usable for 150 miles.

Cargo, as well as owners, offered considerable evidence concerning the use of the beacon by other vessels navigating in the area.[19] Owners object to the evidence presented by cargo concerning receipt of the signals by other vessels on grounds that the conditions were dissimilar. It would, of course, be impossible to reproduce the exact situation which existed on the night of the stranding. With one exception (a vessel which sailed to the west of Quita Sueno), all the other evidence was sufficiently similar to indicate the general capabilities of this particular radio beacon.

Owner's experts had much less success in obtaining reliable bearings from the beacon. However, the evidence established reasons for this, and, obviously, it is much easier to accomplish something if you want to do it.

Finally, the owners argue that, even if the signal had been received and had given a relatively accurate bearing,

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[19] During a time when there is much criticism concerning the abilities of the trial bar, it is worth noting the exceptional efforts which counsel for both major parties took in presenting their cases. No expense appears to have been spared in obtaining all relevant evidence and presenting the best expert testimony. Moreover, the case was tried expeditiously, courteously, and with great competence. The briefing of all the controverted points was extensive. Whatever may be the shortcomings of our trial bar in general, New York's Admiralty Bar seems unaffected by it.

it would not have been of any great aid in navigation. It is true that a single line of bearing is not of the same value as two or more intersecting lines giving a "fix." However, it is possible to make a "running fix"[20] from successive bearings. While such a running fix would not have been tremendously accurate, it would have given a better approximate position than a dead reckoning carried for 12 or more hours.

More important, the beacon on San Andres would have provided an excellent "danger bearing."[21] Providing that a bearing of 205° T. or greater had always been maintained, there would have been no possibility of the vessel running aground on Quita Sueno Bank. The owners argue that Providence Island, which is quite high, might have interfered with the reception. Providence Island would not have cast a shadow along the bearing line unless the bearings grew less than 205°. Consequently, a danger bearing of 205° T. or greater could have been used, and if maintained would have kept the vessel out of danger.

Considering the unavailability of celestial observations, the fact that the vessel was equipped with the wrong type of electronic position finding device, and was operating in open waters too far from land to make any use of the radar and too deep for the depth sounder to be of any value, the importance of the use of the radio direction finder in this instance is apparent. The courts have recognized the general importance of the radio direction finder as a navigational aid. *Waterman Steamship Corp.* v.

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[20] "A 'running fix' is a position determined by crossing lines of position with an appreciable time difference between them and advanced or retired to a common time." BOWDITCH, *American Practical Navigator,* p. 944.

[21] A danger bearing is "the maximum or minimum bearing of a point for safe passage past an off-lying danger." BOWDITCH, *American Practical Navigator,* p. 920.

Gay Cottons (*Chickasaw*), 1969 AMC 1682, 414 F.2d 724 (9th Cir., 1969), Radio direction finders are required on all ships of 1600 tons gross tonnage and up when engaged on international voyages. (1960 Safety of Life at Sea Convention, to which both Ireland and the United States are signatories, Chap. 5, Reg. 12). Consequently, I find that the failure to have the current list of radio beacons aboard the vessel, where the superseded list did not reveal the usefulness of the beacon, was, under the circumstances of this case, an unseaworthy condition.[22]

Causation.

The burden of proof rested initially on the owner to establish that the proximate cause of the loss was an error in the navigation or management of the ship. Owners have met this burden. Having established that the proximate cause of the loss was an excepted peril, the burden shifted to the cargo claimants to establish that the unseaworthiness caused the injury. *Director General of India Supply Mission* v. *S.S. Maru,* 1972 AMC 1694, 459 F.2d 1370 (2 Cir., 1972); *Firestone Synthetic Fibers Co.* v. *M/S Black Heron,* 1964 AMC 42, 324 F.2d 835 (2 Cir., 1963). Moreover, the unseaworthiness must be shown to be "an effective and proximate cause of the damage." *Union Carbide and Carbon Corp.* v. *Walter Raleigh,* 1952 AMC 618, 109 F.Supp. 781, 793 (S. D. N. Y., 1951), *aff'd. sub nom, Union Carbide and Carbon Corp.* v. *United States,* 200 F.2d 908 (2 Cir., 1953).

Was the absence of the new radio beacon list an effective and proximate cause of the grounding? This is an elusive

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[22] Cargo claims also that the vessel was unseaworthy by virtue of the fact that the lookout was stationed on the bridge and not on the bow. Under the conditions prevailing this did not create an unseaworthy condition and, moreover, did not cause the stranding.

issue. We are not dealing with coordinate or sequential causes as in *Union Carbide and Carbon Corp.* v. *Walter Raleigh, supra.* Obviously, inadequate navigational aids increase the risk of careless navigation, which was the immediate cause of the loss. But it is another thing to conclude that the careless navigation could have been prevented had the unseaworthy condition not existed. Justice CARDOZO long ago warned of the dangers inherent in such a consideration:

> "There would be no end to complications and embarrassments if the Courts were to embark upon an inquiry as to the tendency of an unseaworthy defect to aggravate the risk of careless navigation." *May* v. *Hamburg-Amerikanische Packetfahrt Aktiengesellschaft,* 290 U.S. 333, 1933 AMC 1565 at 1575.

Yet that is exactly what we must do.

The reported cases have attempted to avoid such considerations. In *Waterman Steamship Corp.* v. *Gay Cottons, supra,* the Court viewed an unseaworthy condition, resulting from the inaccuracy in the deviation card for the radio direction finder, to have been an instance of combined causation, along with the negligence of the crew, thereby making the ship liable.

In *The West Arrow,* 1936 AMC 165, 168, 80 F.2d 853, 856 (2 Cir., 1936) the Court dealt with a defect in the ship's steering gear and the failure of the owners to respond to publicized information concerning the possibility of such malfunctions as separate proximate causes. The Court held then:

> "Neglecting precautions, which might have been taken if the instructions of the manufacturer had been carried out, makes the ship responsible for the resulting damage without clearer proof than was presented here that the accident was caused by a failure of performance which sprung from a latent defect. Cf. *Atlantic Transport Co.* v. *Rosenberg Bros. & Co.,* 1929 AMC 1539, 34 F.2d 843 (9 Cir.); *Vestris,* 1932 AMC 863, 60 F.2d 273 (S.D.N.Y.); *Ceylon Maru,* 266 Fed. 396 (D. C. Md.). Moreover, negligence in navigation was one of the proximate causes of the stranding as well as failure of the telemotor system. In these circumstances, it is now authoritatively established that there need be no causal connection between the unseaworthiness and the loss. *May* v. *Hamburg-Amerikanischie Packetfahrt Aktiengesellschaft,* 290 U. S. 333, 1933 AMC 1565."

The passage of the Carriage of Goods By Sea Act in 1936 makes the necessity of delineating causation attributable to unseaworthiness unavoidable.

Decisions often avoid such a difficult interplay by simply finding that the unseaworthy condition was not the cause of the defective navigation. In the *Director General of India Supply Mission* v. *S/S Maru, supra,* the Court found that, although there were outdated charts which constituted an unseaworthy condition, the Master had not relied thereon, and, consequently, the stranding was not caused by the unseaworthy condition. In *United States* v. *Soriano,* 1967 AMC 41, 366 F. 2d 699 (9 Cir., 1966), it was found that the inoperativeness of the fathometer had nothing to do with the pilot's negligent navigation of the vessel, which alone was the proximate cause of the stranding.

Owners, naturally, rely heavily on Judge FRANKEL's decision in *M. S. Nicolaos S. Embiricos, supra.* That case rests on the factual finding that the error was not in the failure to supply proper navigational information but in the Master's improper use of information available aboard the vessel. Here, however, we have an omission which affected

the quality of the navigation. Analytically, there is no difficulty in labelling an omission as a "cause." The point is made by HART and HONORE in *Causation in the Law,* p. 179 (1962):

> "There are a number of situations in the law of negligence * * * where a defendant is liable for providing or not removing the opportunity for another to do harm or for a natural event to cause it. The 'causal connection' between a defendant's act and the harm may be succinctly described by saying that he has 'occasioned' it.
>
> "The use of this notion in the law is an extension of the general idea, common in non-legal thought, that the neglect of a precaution ordinarily taken aganst harm is the cause of that harm when it comes about."

The question is whether compliance with the duty to maintain a seaworthy ship might have prevented the intervening cause, *viz.,* the error in navigation. This is, of course, a question of fact. We must determine whether the direct or intervening cause "is a significant part of the risk involved in the defendant's conduct, or is so reasonably connected with it that the responsibility should not be terminated," or, more simply, whether the intervening cause is foreseeable. PROSSER, *Torts* (4th Ed., 1971) at 272.

Though the omission may not set the stage for an affirmative intervening cause, it may be no less a "proximate cause" for permitting an intervening event to cause injuries which might have been avoided. For example, in *Zinnel* v. *U. S. Shipping Board Emergency Fleet Corp.,* 1926 AMC 632, 10 F.2d 47 (2 Cir., 1925), defendant failed to provide a guard line along the side of the deck. During a storm a crew member was washed off the deck. The issue was whether a line would have prevented the deceased from falling. Judge LEARNED HAND's opinion for the Court

answered:

> "About that we agree no certain conclusion was possible * * * (W)e are (not) justified, where certainty is impossible, in insisting upon it. We cannot say that there was no likelihood that a rope three feet above the deck * * * would not have saved the seaman." *Id.* 1926 AMC at 635, 10 F.2d at 49.

The clear implication of Judge HAND's opinion is that claimants are entitled to prove that the omission caused the injury by permitting an intervening cause which might have been prevented.

This opinion was cited in a later case involving somewhat analogous facts. In *Kirincick* v. *Standard Dredging Co.,* 1940 AMC 868, 112 F.2d 163 (3 Cir., 1940), the Court held that failure to throw a life preserver to a seaman who had fallen off a barge was actionable negligence. Compliance with the duty would not have affected the intervening cause (falling overboard) but would have prevented the ultimate injury.

Having found that the ship's officers would have made use of the beacon had they known of its availability, and that this would have provided vital navigational information that would have prevented the stranding, the unseaworthy condition was an effective cause of the loss. It was a "proximate cause" under the general principles of tort described above. Although the absence of the new radio beacon list may seem a small defect, "the event turned on [it] * * * as the massive door of a vault turns on a small jewel bearing."[23]

Due Diligence.

The finding that an unseaworthy condition existed and contributed to the loss leaves one remaining issue. It

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[23] Wouk, *The Caine Mutiny,* Preface.

must be found that the failure to exercise due diligence by the owner caused the unseaworthy condition. The burden is on the carrier to prove that it used due diligence to make the vessel seaworthy. This burden is clearcut and never shifts from the carrier. 46 U. S. Code, sec. 1304 (1).[24] Any question as to the exercise of due diligence is strictly construed against the carrier. *Compagnie Maritime Francaise* v. *Meyer,* 248 Fed. 881 (9 Cir., 1918). In *Metropolitan Coal Co.* v. *Howard,* 1946 AMC 1154, 1158, 155 F.2d 780, 783 (2 Cir., 1946), Judge LEARNED HAND said:

> "the warranty of seaworthiness is a favorite of the admiralty and exceptions to it or limitations upon it, are narrowly scrutinized."

The evidence was clear that there was no regular practice of providing U. S. charts, pilots, or radio beacon lists to the vessel. The current and new British Admiralty navigational publications were only available through a bureaucratic system by which the owners first mailed to the vessel a notice to mariners indicating the publication of new-periodicals. The vessel then filled out a form indicating its desire to have the publication which was then mailed back to Ireland. The owners would then obtain the required publication and mail it to the vessel. This system takes several months for vessels in the Western Hemisphere. It was followed in this instance and during that several-month period the vessel ran aground for want of the necessary publications. The owners knew that the vessel was awaiting the publications during this period.

Owners argue that there was nothing to stop the Master of the vessel or the navigator from independently purchasing the necessary nautical publications. However, the publications were, presumably, first available only in the British Isles. Moreover, the directions given to the vessel were very clear that this was not the usual or proper method of proceeding, and such independent purchasing was clearly discouraged.[25]

While there are many publications whose necessity is a matter of discretion, the Pilot (whose absence might have been a contributing although not proximate cause) and the List of Radio Signals were clearly necessary to the vessel, and no order from the navigator to the home office should have been necessary. The 1971 List of Radio Signals could have been obtained by owners two and one-half months before the stranding. Indeed, the notice that the publications were available (rather than the publications themselves) was received by the ship a month and a half before the stranding. Publications, when ultimately sent, were not even air mailed. The publications should have been obtained by the owners as soon as they were available and immediately air mailed to the vessel. The failure to do so constituted a lack of "due diligence."

Conclusion.

Owners and charterers are liable to cargo and an interlocutory judgment should be entered reserving damages

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[24] Section 1304 (1) of the Act provides that:

"Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section."

[25] Exh. Z, concerning the normal procedure for ordering nautical charts, reads, in part, as follows:

"On receipt of any orders for charts from our vessels the order is duly passed on to our contract supplier who processes this order and forwards charts, etc. to the address which will be most suitable for the vessel concerned.

"The only time that we deviate from this practice is when a vessel urgently requires a chart for an area to which she may be proceeding and which may not be on board at that time • • •."

While this refers (by its terms) only to charts, the ordering of publications, which are more expensive, was governed by the same bureaucratic approach.

for later determination. Charterer is entitled to be indemnified by owners for this liability under the terms of the charter, and to judgment against owners for all losses and damages resulting from the loss of the vessel.

Memorandum-Decision of Frankel, *D.J.*

MARVIN E. FRANKEL, D.J. (March 4, 1975):

The court has studied the record, the painstaking Report of Magistrate GOETTEL, and the opposed submissions of the parties as to whether the Report should be approved. With one exception, the Magistrate's findings and conclusions are confirmed. The single exception, as will appear, requires a remand.

The record amply supports, certainly against any claim of "clear error," the Magistrate's findings that (1) the aerial radio beacon on San Andres Island was operating on the night of the stranding; (2) the *Irish Spruce* could have made contact with the beacon had the ship's officers purposefully tuned the radio direction finder; and (3) this would have made possible the obtaining of a "running fix" from the beacon which would have revealed that the ship was off course and avoided the stranding.

Similarly, the court sustains the finding that the absence of the 1971 Admiralty List of Radio Beacons aboard the *Irish Spruce* constituted an unseaworthy condition. While the existence of the San Andres beacon was noted in various books on the vessel, none of these provided the information contained in the 1971 List concerning the power of the beacon and its continuous operation. The Magistrate could find, as he did, that the power rating, far from being irrelevant, reveals the effective range of the beacon and, as demonstrated by Captain Kerr's own inaccurate knowledge of the beacon, is a factor in an experienced navigator's decision whether to try to make contact. Positive information that the beacon operated

continuously would provide an added incentive to attempt contact during the hours between midnight and 4:00 a.m. Absence of the revised list deprived the ship of the information which was available and which it needed to be reasonably equipped to carry out its services.

The Magistrate followed a correct conception of the applicable law in his analysis of the causation issue. The law under the Carriage of Goods by Sea Act is clear that if both an "excepted peril" under sec. 4(2), 46 U. S. Code, sec. 1304(2) (1970), and unseaworthiness or another element described in sec. 3(1), 46 U. S. Code, sec. 1303(1) (1970), concur in causing cargo damage, the shipowner is liable for the entire loss unless he can exonerate himself from part of the liability by showing that some portion is attributable solely to the "excepted peril." *See J. Gerber & Co.* v. *S. S. Sabine Howaldt,* 1971 AMC 539, 437 F.2d 580, 588 (2 Cir., 1971); *Union Carbide & Carbon Corp.* v. *Walter Raleigh,* 1952 AMC 618, 109 F. Supp. 781, 791 (S. D. N. Y., 1951), *aff'd,* 200 F.2d 908 (2 Cir., 1953). This familiar doctrine, given the basic events as the Magistrate reconstructed them, leads to the result he reached. There were concurring causes in the pertinent sense. While the court might be disposed to alter their characterizations—viewing the condition of unseaworthiness as the intervening "but for" cause—this could not be of any use to the complaining shipowner.*

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* Still more clearly unavailing was the shipowner's protests over the Magistrate's approving views, from personal experience, of loran. With characteristic thoroughness and candor, Magistrate GOETTEL reported his opinions, then made explicit and plain that the absence of loran played no material part in the decision. It is a long leap of psychoanalytic reasoning to argue that his thoughts about loran led to an overly strict "counsel of perfection" in finding a lack of due diligence because the shipowner delayed for over three months in supplying the important new radio list. Whether a contrary view of such leisurely handling might have been permissible, it would be more debatable than the one the Magistrate reached.

There remains the significant finding of which the court is driven to withhold approval. This is the finding that the crew, and quite particularly, Second Officer Healy, would have consulted the up-to-date radio list and thus discovered the availability of the San Andres beacon. From the court's study of the record, the evidence appears to refute rather than support the finding that Second Officer Healy would have consulted the list. And if that is so, the record may not support the finding that any responsible officer at any material time would have done so. At least, the Magistrate's determination appears to hinge crucially upon the Second Officer and what he probably would have done.

In this setting, it may be of decisive significance that Second Officer Healy testified as follows:

> "Q. Did it occur to you on your 12 noon to 1600 watch to look in the various publications *you had aboard* the ship for information about an aero beacon on San Andres Island?
>
> "A. No, sir, it did not.
>
> "Q. Did it occur to you to look for whatever information *you had aboard* the ship for an aero beacon on San Andres Island after midnight of that same day?
>
> "A. No, sir, it did not.
>
> "Q. Did you in fact look for it?
>
> "A. I don't remember looking for it, no."

Granting the importance of the impressions of conscientiousness drawn by the Magistrate from observing Second Officer Healy, the quoted testimony would appear to cut considerable, very possibly crucial, ground from under the finding that the radio list would have been used.

Whether that finding (or a comparable finding as to what others of the ship's complement might have done or what Healy might have done in the way of studying a new list before the fateful night) might nevertheless stand is a question the court is not prepared finally to decide upon the cold record. It is prudent, rather, if not plainly compulsory, that the matter be remanded to the Magistrate for further proceedings consistent with the views expressed herein. There is no occasion, of course, for taking further evidence upon the remand. Counsel should be invited to make further submissions before the Magistrate as to whether, if at all, this interim opinion of this court should change the ultimate result. Those submissions may include demonstrations, if available, that this court has misconceived the evidence or overlooked some vital portion of it. The eventual result may be a reaffirmed recommendation holding the shipowner liable or any other findings and conclusions the Magistrate deems warranted in all the circumstances. The findings and conclusions expressly approved in this opinion should stand without reexamination unless some compelling reason is shown why the single finding causing the remand requires reopening of other aspects (a course the court reserves as a theory but deems thin as a real possibility).

Upon the foregoing grounds, and for the narrow purpose stated, the case is remanded to the Magistrate for the ultimate rendering of a supplemental report.

Special Master's Supplemental Report.

SUPPLEMENTAL SPECIAL MASTER'S REPORT (May 8, 1975).
GERARD L. GOETTEL, U. S. Magistrate:

This case has been remanded for the issuance of a supplemental report on the limited question of whether the crew of the *Irish Spruce,* and in particular Second Officer Healy, would have consulted in the 1971 radio list had it

been aboard and thereby discovered the availability of the San Andres beacon. The court's doubts in this respect arose from testimony given by Healy that it did not occur to him, at the crucial time, to look in the ship's navigational publications for information about an aero beacon on San Andres Island. The court found that this testimony raised some question upon the finding that the new radio list would have been used had it been aboard.

In the context of the overall testimony, I did not (and still do not) arrive at such a conclusion. Healy had navigated through these waters before. He was familiar with the fact that the Swan Island beacon was in the old list and, indeed, had recorded in his own journal, during the prior trip, the call sign and frequencies for Swan Island and Grand Cayman, which is somewhat to the northeast of Swan Island. On the night in question, Healy turned on the radio direction finder and attempted to pick up the Swan Island signal which was the nearest radio direction beacon of which he was then aware. Consequently, the conclusion to be drawn from the testimony set forth in the memorandum opinion of the court is that it did not occur to the navigator to look in the old radio list since he was already completely familiar with its contents. He knew he would not find San Andres in it, nor any other station within 200 miles.•

It is true that there is no direct evidence on the question of whether Healy, or other members of the crew, would have used the new light list had it been available. Since we are dealing with a question of what persons *might* have done, had the ship been differently equipped, there can be no direct evidence on the point. Pertinent testimony on the possibilities appears on pages 65-69 of the transcript.

• Another marginal station was Puerto Cabezos in Nicaragua, about 200 miles away. However, the 1969 list states it has "Services: By Day" while the new list reveals it by then had continuous service.

Acknowledging that he had not known about the San Andres beacon, Healy at first testified that he didn't think he would have used it had he known of it. The following cross-examination then occurred:

> "Q. Going back to the radio beacon at Isla San Andres you say you didn't know there was a radio beacon there. But if you had known there was a radio beacon there and if you had known it had power of a thousand watts, and that it had continuous transmission, don't you think it is possible you would have used it then?"
>
> "A. It is possible, but I don't honestly know."

After then establishing that none of the other navigational aids were of use to the vessel at that time and in those waters, the cross-examination continued:

> "Q. It is true, isn't it, that you should use all the navigational aids that you can?"
>
> "A. It is."
>
> "Q. Is that what you normally do?"
>
> "A. Normally, yes."
>
> "Q. If you thought Isle San Adres would have been of help to you, you would have used it, I take it?"
>
> "A. I wasn't aware that a beacon existed there."
>
> "Q. But if you had been aware and thought it was good, you would have used it, would you?"
>
> "A. If I thought it was good, then I assume I would have used it."

The above answers are obviously somewhat equivocal. At the very conclusion of the trial, Healy was recalled. In response to questions from the court, he testified as follows:

> "Q. I take it when you first went on watch at midnight, you made an attempt to locate stations by dial

twisting and going around the dial, seeing if you picked up any signals, is that correct?"

"A. I don't think so, your Honor, no."

"Q. What did you do?"

"A. As far as I recall, what I tried to get was to receive a signal from Swan Island."

"Q. That was the only one you attempted to receive?"

"A. That was the only one I attempted to receive."

"Q. You did not attempt to receive San Andres because you were unaware of the fact there was a beacon there, is that correct?"

"A. That's correct."

"Q. Has it been your experience in operating a radio direction finder that if you know the approximate bearing of the signal you are looking for, it is more easy to find it than if you are merely making a sweep attempting to pick up any signals that happened to be in the area?"

"A. It certainly helps if you have a general idea of where you expect the hearing will be."

As mentioned earlier, Healy had been along this course before. He had used the beacons on Swan Island and Grand Cayman and recorded the signals in his own journal. He turned on the radio direction finder to Swan Island when he came on duty and because he knew it was there, but he did not know of San Andres. When Healy came on watch, the Swan Island beacon was approximately 300 miles away and San Andres only 100 miles. He acknowledged in his deposition that if there was a beacon within range, it would have been of value. It follows that if he would try a station 300 miles away, he would certainly have tried one only one-third that distance.

As all parties acknowledged, Healy was an officer of "meticulosity in matters of navigation." (Carrier's Post Trial Brief, p. 12.) His personal journal contains a half dozen references to radio direction finder beacons. (February 8, March 7, July 17, July 26, September 1, October 1.) From his prior performance, plus his testimony, it is apparent that he used radio beacons whenever they were available and necessary. On the prior voyage southward, he used Swan Island and Grand Cayman on October 1, but on October 2, despite overcast skies which prevented celestial sights, no attempt was made to use the RDF as they sailed south from the Quita Sueno and Roncador Bank passage. The obvious explanation for this is that they were out of Swan Island's range and did not know of the San Andres beacon. Indeed, both Healy and other ship's officer involved in taking navigational sights (Chief Officer Kelly), testified of their inability to find San Andres in the old radio list aboard, either in the index or the geographical listings.

The carrier argues that it is impermissible to draw inferences from such circumstantial evidence. It would be overly simplistic to conclude that, since a prudent navigator should have consulted a new light (*sic.* radio) list to see if there had been additions for the area in which they were sailing, that this navigator would have done so. However, Mr. Healy had placed the order for this new radio list, he testified that he should and normally does use all available aids, and his journal establishes that he had done so in the past. It is not a matter of piling inference on inference as argued by the carrier, but simply whether he would, or would not, have used the San Andres beacon had he had adequate information in order to make use of it.

The carrier repeats certain arguments made in the objections to the report as to which no specific remand was made. It argues that, while hypothetical standards may be

adequate to establish what constitute seaworthiness, they may not be used in order to satisfy the burden of proof of causation. Indeed, it points to the *Marine Sulphur Queen,* 1972 AMC 1122, 460 F.2d 89 (2 Cir., 1972), *cert. denied,* 409 U.S. 982, 1973 AMC 540, as establishing a different standard of proof of causation of cargo claims from personal injury claims. There is no doubt that the burden of proof was on the cargo interests. It does not follow, however, that they must establish causation by direct evidence.. Indeed, we are dealing with what the District Court has described as an intervening "but for" cause. There can be no direct evidence, and the trier of fact is compelled to resort to conclusions as to what would have occurred had the unseaworthy condition not existed.

It is true that the San Andres beacon is not as clearly listed in the 1971 *Admiralty List of Radio Signals* as it might have been. It geographically appears under Colombia, although it is closer to the coast of Nicaragua, and in the general index it appears only under the name of "Isla San Andres" not under "San Andres Islands." It would, therefore, have been possible to have missed it in examining the new list. However, the entire format of the list of radio signals had been changed and other new stations added. It invited a careful review of the geographic section to determine the stations available.

If the San Andres beacon were known to the officers, and with the radio direction finder already turned on, it is hard to imagine, considering the qualifications of the officers aboard and the navigational situation then existing, that they would not have used the San Andres beacon. The evidence established that the beacon's capabilities were sufficient for purposes of making a rudimentary running fix, and would have provided an excellent danger bearing. Consequently, I adhere to my earlier findings.

Supplemental Memorandum-Decision of Frankel, D.J.

MARVIN E. FRANKEL, D. J. (June 16, 1975):

Following the remand ordered in the court's memorandum of March 4, 1975, Magistrate GOETTEL received further briefs and reconsidered the question of fact for which the case had been returned to him. In a Supplemental Report dated May 8, 1975, he states and justifies his adherence to the ultimate finding of fact which the court deemed insufficient on the prior review. The parties have had and employed opportunities to seek confirmation or disapproval of the Supplemental Report. The court has reviewed the entire proceeding and these most recent presentations. It is concluded that the Supplemental Report is sound and should be sustained. It follows that the relief recommended in the original Report, dated October 15, 1974, will be granted

Dealing effectively with the sharply defined problem entrusted to him by the remand, the Magistrate's further analysis of the record compels affirmance of the disputed finding. For the reasons he outlines, and upon the record documentation he notes, the Magistrate is now found to have been justified in finding that Second Officer Healy (probably along with one or more other officers) would have consulted and familiarized himself with the new radio list had it been aboard the ship and, based on the additional information contained in the up to date list, would have employed the San Andres beacon, only 100 miles off when he came on watch, rather than seeking in vain to use the much more distant Swan Island signal, which could not be reached because of static interference when Healy made his only attempt to receive the signal.

In the nature of the case, the determination had to be as to what course of conduct "would have been" the more probable in the circumstances. But this does not mean

Supplemental Memorandum-Decision of Frankel, D.J.

that the finding is either conjectural or infested with any misconceptions concerning the burden of proof. It is plain that the Magistrate had a correct view of the burden of proof and that he violated none of the rules or supposed rules limiting the drawing of inferences from evidence. It was not error, for example, to consider Healy's proved record of meticulousness, including his habits of learning and employing radio beacons and other aids, along with other evidence, in deciding what he probably would have done on the night in question had the new list been on the vessel before then. More broadly, the court finds persuasive—surely not clearly erroneous—the synthesis of the evidentiary materials given by the Magistrate in his resolution of this question.

Settle an interlocutory judgment as recommended by the Magistrate's Report and Supplemental Report.

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 487, 488—September Term, 1975.

(Argued February 9, 1976 Decided January 17, 1977.)

Opinion reassigned on November 1, 1976 to Judge Lumbard at the request of Judge Timbers.

Docket Nos. 75-7441, 75-7445

AMERICAN SMELTING AND REFINING CO.,

Plaintiff-Appellee,

v.

S.S. IRISH SPRUCE, her engines, tackle, etc., and IRISH SHIPPING LTD.,

Defendants-Appellants.

In the Matter of the Complaint of IRISH SHIPPING LTD., Plaintiff-Appellant, as owner of the S.S. "IRISH SPRUCE", for exoneration from or limitation of liability.

COMPANIA PERUANA DE VAPORES, S.A.,

Claimant-Appellant;

SPRAGUE & RHODES COMMODITY CORP., ET AL.,

Claimants-Appellees.

Before:

LUMBARD and TIMBERS, *Circuit Judges,*
and BRYAN, *District Judge.**

On appeal by shipowner from interlocutory judgment for cargo loss entered July 2, 1975 in the Southern District of New York, Marvin E. Frankel, *J.*, upon reports of Magistrate Gerald L. Goettel,** serving as Special Master.
Reversed.

NICHOLAS J. HEALY, New York, N.Y. (Allan A. Baillie, John C. Koster, Healy & Baillie, New York, N.Y., on the brief), *for Appellant Irish Shipping Ltd.*

RICHARD G. ASHWORTH, HAIGHT, GARDNER, POOR & HAVENS, New York, N.Y., on the brief, *for Appellant Compania Peruana de Vapores, S.A.*

DOUGLAS A. JACOBSEN, New York, N.Y. (Francis M. O'Regan, Bigham, Englar, Jones & Houston, New York, N.Y., on the brief), *for Appellees.*

LUMBARD, *Circuit Judge:*

This appeal concerns the district court's confirmation of a special master's report which found the S.S. Irish Spruce to have been unseaworthy at the time of its foundering in the Caribbean and which further found that this un-

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* United States District Judge for the Southern District of New York, sitting by designation.

** Now United States District Judge for the Southern District of New York.

seaworthiness was a proximate cause of the stranding. We find the holding relating to proximate causation to be erroneous and, accordingly, reverse.

I.

The events leading up to the stranding were recounted in depositions from all the officers of the Irish Spruce and in testimony before the magistrate by First Officer Kelly and Second Officer Healy. Loaded with appellees' cargo, the Irish Spruce cleared the Panama Canal and entered the Caribbean on January 25, 1972. Her projected course to New Orleans was northerly toward the Yucatan Pass (which lies between Cuba and the Yucatan Peninsula), passing between Roncador Bank and Serrana Bank to the east and Quito Sueno Bank to the west. Quito Sueno, whose name translates as "troubled sleep," is an uninhabited or virtually uninhabited possession of Colombia which lies about 120 miles off the eastern coast of Nicaragua and at a greater distance north of Colombia's mainland. As the magistrate reported, "hazards to navigation are poorly marked and inadequately serviced" in this area of the Caribbean.

Early in the morning of January 26, shortly after the ship left the Canal, rough seas and heavy swells forced a change of course more to the eastward than had been planned originally. As the weather eased at midday other minor adjustments were made in order to regain the base course. Partly cloudy skies and rain made it impossible to obtain reliable star sights. Reliance, therefore, was placed on "dead reckoning" and "sun line" positions, navigational techniques which are inherently inferior to star sights or radio fixes and which are only used in the absence of surer guideposts. At about 0930 or 1000 hours on the 26th, Third

Officer O'Connor took sun sights and then moved up the ship's morning position line until noon, when he took more sun sights. Second Officer Healy checked O'Connor's work and concluded that it was correct. At dusk (about 1900 hours), Chief Officer Kelly attempted to obtain an accurate locational fix by using star sights, but he was prevented from doing so when rain obscured the horizon.

During the oncoming night the ship was to pass between the poorly marked Roncador and Quito Sueno Banks. In order to do so the navigators intended to alter the ship's course from 330 degrees to 323 degrees upon the first sighting of Roncador Bank. The light on Roncador is visible 13 miles under optimum conditions and it was planned that the boat would pass 11 miles off Roncador at 2300 hours on the 26th. The Roncador light was never sighted that evening and the vessel was kept on the 330 degree course until midnight when the shift to a 323 degree course was finally made. Although the vessel was equipped with a working radar apparatus, no radar reflection was had off of Roncador; this may not have been surprising, however, since Roncador was a low lying reef and the only high object, the light tower, was an open latticework structure without a special radar reflector. Even though no precision sightings had been had since the noontime sun sight and even though the sun sights employed are inherently less accurate than star sights or radiobeacon fixes, the Irish Spruce steamed ahead at full speed into the night.

Second Officer Healy, a relatively young officer whom Magistrate Goettel described as "an officer of 'meticulosity in matters of navigation,' " stood watch on the bridge with a seaman lookout from midnight on, early on the 27th. Captain Kerr was also on the bridge during most of this watch. The radar and fathometer (depth meter) were in

operation. However, since the vessel was travelling far off the mainland and since the various reefs were low lying, the radar was none too valuable a navigational tool in these waters. Furthermore, since the reefs in this part of the Caribbean come up very fast from the bottom, which is to say that they are steep sided, the fathometer was also a most inadequate tool to prevent stranding since it was unlikely to provide enough advance warning to allow the officer in charge to do anything in time.

The Irish Spruce was also equipped with a British-made, Decca-brand Navigator. This is an electronic position finder which depends on signals from special sending stations. It was far beyond the reach of such signals in this part of the Caribbean. The ship did not have a similar, though incompatible, American-made Loran navigational system which would have been of some use in this part of the world during nighttime hours. Finally, the Irish Spruce was equipped with a radio-direction finder (RDF) which was useful in locating more or less precisely the orientation of any radio signals which might be receivable. In this part of the Caribbean, however, radio signals useful to the RDF were few and far between. On the basis of previous trips through these same waters, navigator Healy knew that a radiobeacon was located on Swan Island, a former British possession some 200 or so miles north of Quito Sueno Bank. When his watch began early on the morning of the 27th, Healy had the RDF turned on in an effort to pick up the Swan Island beacon. After warming up the unit he was only able to hear static on the channel assigned to Swan Island. He turned off the set without rotating the dial to try to find other signals. Having been through these shipping lanes before, Healy apparently thought that he already knew the few radiobeacons which might be available and so he did not refer on this particular occasion to the 1969 edition of the British Admiralty List

of Radio Signals which was on board the Irish Spruce, a work which he had consulted on previous occasions.[1]

If Healy had rotated the dial of the RDF, he might have picked up the signal sent out by an aero radiobeacon located on San Andres Island, about 100 miles to the west. This beacon was not included in the several listings of radio beacons in the 1969 List aboard the ship; its existence was, however, shown on a clear map of this region which appeared in the back of the 1969 List. Its omission from the listings appears to have been because the signal was categorized as an aero radiobeacon as opposed to a marine radiobeacon. Aero radiobeacons are often perfectly suited for ships to use as well as airplanes but not in all situations (e.g. where there is a land obstruction or where the beacon's strength is largely or entirely diverted upwards at the sending station for the convenience of planes). The San Andres radiobeacon would likely have been useful for a ship RDF since there was no elevated land near the sending station and since the signal apparently went out along the ground level as well as upwards.

A new 1971 edition of the British Admiralty radio signal list, which had been mailed to New Orleans to await the ship's imminent arrival, included the San Andres beacon in its listings, not just on a map; furthermore, the general organization of this edition was significantly varied from that of the 1969 edition. The magistrate concluded that Healy, being a meticulous young officer, would have pored over this edition if he had had it on board and, having done so, would have found the San Andres listing even though it appeared under "Colombia," a country much further away to the south than "Nicaragua" which lay 120 miles to the west. The 1971 edition would also have given

[1] At trial, Healy was not specifically asked why he had not consulted the List on this particular occasion.

the beacon's strength, 1 kilowatt, a power rating sufficiently high by radiobeacon standards so that, in Magistrate Goettel's estimation, the ship's officers would have been particularly motivated to try to pick it up. Healy testified that had he known of the San Andres beacon, he might have tried to raise it on the RDF; however, he also testified that on hearing interference static on the Swan Island channel, he expected to hear static on all other channels and therefore might not have bothered to check the San Andres channel in any event. The magistrate found further that if the San Andres beacon had been used, the stranding probably would have been avoided.

The San Andres signal was never used, however, and the ship's officers kept to the course onto which they had headed at midnight and maintained full speed. Radar picked up several reflections taken to be rain squalls and one stationary object with no lights. The captain took this radar blip to be a seagoing fishing boat lying dead in the water without lights.

At 0329 hours on the 27th the captain noted the fathometer indicated a sharply rising bottom and showed that the Irish Spruce had just passed over a reef only seven feet beneath the keel. At the same time Healy and the look-out saw the unpleasant spectacle of surf breaking just ahead. Although the engines were quickly reversed the ship ran hard aground on Quito Sueno Bank.

Following the stranding, appellee American Smelting and Refining Co. instituted an action against the ship and against the time charterer, Compania Peruana de Vapores, for the loss of cargo. The shipowner filed a separate complaint for exoneration from, or limitation of, any liability arising out of the stranding, and the first suit was thereupon stayed. Cargo claimants Sprague & Rhodes Commodity Corp. and American Smelting filed claims for $2.2

million in the limitation proceeding. The two suits were consolidated for trial on the sole issue of liability.

In January 1974 Judge Frankel requested the parties' consent to refer the case to a magistrate to "hear and report." Upon securing consent of the parties, Judge Frankel referred the case to Magistrate Goettel by an order entered January 28, 1974. After a three-day hearing in April 1974, Magistrate Goettel filed a report on October 15, 1974 holding both the shipowner and time charterer liable to the cargo claimants and holding that the charterer was entitled to indemnity from the shipowner. Magistrate Goettel found that the shipowner's delay in furnishing the 1971 British Admiralty List rendered the Irish Spruce unseaworthy and was a cause of the stranding.

After the cargo claimants had moved for confirmation of the magistrate's report and after objections had been filed thereto, Judge Frankel, on March 4, 1975, approved the magistrate's report insofar as it found unseaworthiness but withheld approval of his ruling that proximate causation had been shown between the unseaworthy condition (the absence of the 1971 British Admiralty radiobeacon list) and the occurrence of the stranding. He remanded the case to Magistrate Goettel for a supplemental report on causation. In his supplemental report of May 8, 1975, Magistrate Goettel adhered to his original position, basing it primarily on his belief that navigator Healy would have carefully combed the new 1971 volume had it been available on board, and in doing so, would have discovered the existence of the San Andres beacon and its 1 kilowatt power. Judge Frankel approved the supplemental report in a memorandum decision dated June 16, 1975, and an interlocutory judgment was entered July 2, 1975, from which this appeal has been taken pursuant to 28 U.S.C. § 1292 (a)(3).

II.

There can be quarrel with the finding in the magistrate's initial report that the "immediate cause of the stranding was imprudent navigation." It is clear that the Irish Spruce was set on a route which took it through treacherous waters. Quito Sueno Bank was low lying and thus a poor radar target. The only light marking the bank is located at the northern tip, which means that ships approaching from the south, such as the Irish Spruce, could run aground before the light was ever spotted. As noted previously, the reefs and shoals in this part of the Caribbean often rise so quickly from the depths that a fathometer is virtually useless as a tool for safe navigation. Finally, radiobeacons were infrequently spaced in this region. Notwithstanding these perils and notwithstanding that the ship had been sailed by what was essentially nothing more than dead reckoning for almost 24 hours, the ship was kept at full speed across the darkened waters.

Liability was not placed on the appellants because of poor seamanship, however. Such a risk is an excepted peril under the clear terms of Section 4(2)(a) of COGSA, 46 U.S.C. § 1304(2)(a). Liability was imposed because it was determined by the magistrate that the absence of the 1971 British Admiralty List of Radio Signals (Vol. 2) was an "unseaworthy condition" and that this omission was a proximate cause of the stranding. Quoting Herman Wouk's *Caine Mutiny,* the magistrate concluded that while "the absence of the new light list may seem a small defect, 'the event turned on [it] . . . as the massive door of a vault turns on a small jewel bearing.'"

As we conclude that no showing of proximate cause has been made as a matter of law, we must reverse the interlocutory judgment of the district court. Magistrate Goettel

found that had Officer Healy, or any other officer, known of the San Andres radiobeacon and its 1.0 kw power and continuous operation, he would have attempted to navigate by it. This information could have been obtained from the lists in the 1971 Admiralty List of Radiobeacons if that edition had been aboard at the time. However, the existence, call sign, and radio frequency of the San Andres beacon were also readily ascertainable from the area diagram contained in the 1969 Admiralty List of Radiobeacons, which was on board. No satisfactory explanation is offered for why Officer Healy ignored the diagrams and relied instead solely on the alphabetical and geographical indices in the body of the 1969 volume.

It is clear that if Officer Healy had inspected the diagrams, he would have been no less likely to attempt to raise a signal from the San Andres beacon than he would have been if the 1971 List had been available. Of course, the diagram did not specify the power or times of operation of the radiobeacon, and there is also some dispute between the parties over the authoritativeness of these diagrams, but these facts seem irrelevant to this case. From textual discussion in the 1969 edition, it appears that aero radiobeacons on small islands can be a useful tool for marine navigation. Most aero beacons broadcast twenty-four hours a day, and the relatively small size of the island land mass reduces the possibility of error being caused by "land effect" through the reflection or refraction of the radio waves. Lacking any better means of navigation and knowing that aero radiobeacon might be broadcasting from San Andres, any reasonably conscientious navigator would have checked the beacon's frequency on the RDF simply on the chance that a signal could be raised. Thus, under the circumstances the 1969 edition should have been fully as adequate as the 1971 edition.

The magistrate assigned great significance to his conclusion that Officer Healy, who had never discovered the San Andres listing in the 1969 edition, would have discovered it in the reorganized 1971 edition. This fortuity, however, has nothing to do with proximate cause. Liability must rest on causal relationship between the negligent aspect of the conduct and the harm resulting from the conduct. See, *e.g.*, *Mahone* v. *Birmingham Elec. Co.*, 261 Ala. 132, 73 So. 2d 378, 381-82 (1954); *Browne* v. *Shyne*, 242 N.Y. 176, 151 N.E. 197 (1926); *Cirsosky* v. *Smathers*, 128 S.C. 358, 122 S.E. 864, 865-66 (1924); *Gorris* v. *Scott*, L.R. 9 Ex. 125 (1874). See generally R. Keeton, Legal Cause in the Law of Torts 13-18 (1963). The purpose of requiring shipowners to send new manuals and charts to their ships promptly is not the stimulation of studiousness among crews. Where the absence of up-to-date manuals and charts is an unseaworthy condition, the damage that is proximately caused by this unseaworthiness is such damage as is attributable to inadequacy of the out-of-date materials. Here the damage was not a consequence of any inadequacy in the 1969 edition; the damage resulted from the ship's officers' failure to make full use of the 1969 edition. It is no reflection on the 1969 edition that the accident might have been avoided because Officer Healy would have studied the 1971 edition and found in it what he had overlooked in the 1969 edition. Therefore, any unseaworthiness which conceivably might be charged to the absence of the 1971 edition cannot be held to have been a proximate cause of the stranding.

The judgments against the S.S. Irish Spruce, Irish Shipping Ltd., and Compania Peruana de Vapores, S.A. are reversed.

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of January, one thousand nine hundred and seventy-seven.

Present: HON. J. EDWARD LUMBARD

HON. WILLIAM H. TIMBERS
Circuit Judges

HON. FREDERICK vP. BRYAN
District Judge

75-7441
75-7445

AMERICAN SMELTING AND REFINING COMPANY,

Plaintiff

v.

S.S. IRISH SPRUCE, her engines, tackle, etc.,

Defendant

v.

IRISH SHIPPING LTD.,

Defendant-Appellant

Judgment of the Court of Appeals.

In the Matter of the Complaint of Irish Shipping Ltd., Plaintiff as Owner of the S.S. "IRISH SPRUCE", for exoneration from or limitation of liability,

COMPANIA PERUANA DE VAPORES,

Claimant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO
Clerk

by VINCENT A. CARLIN
Vincent A. Carlin
Chief Deputy Clerk

Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Fourth day of March, one thousand nine hundred and seventy-seven.

Present: HON. J. EDWARD LUMBARD,

HON. WILLIAM H. TIMBERS,
Circuit Judges.

HON. FREDERICK VANPELT BRYAN,
District Judge.

75-7441,
75-7445

In the Matter of the Complaint of

IRISH SHIPPING LTD., Plaintiff-Appellant, as owner of the S.S. "IRISH SPRUCE", For exoneration from or limitation of liability.

COMPANIA PERUANA DE VAPORES, S.A.,
Claimant-Appellant,

SPRAGUE & RHODES COMMODITY CORP., et al.,
Claimants-Appellees.

Order Denying Petition for Rehearing.

AMERICAN SMELTING AND REFINING COMPANY,
Plaintiff-Appellee,

v.

S. S. IRISH SPRUCE, her engines, tackle, etc., and against IRISH SHIPPING LTD.,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellees,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
A. Daniel Fusaro
Clerk

Order Denying Petition for Rehearing en Banc.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Fourth day of March, one thousand nine hundred and seventy-seven.

75-7441,
75-7445

In the Matter of the Complaint of

IRISH SHIPPING LTD., Plaintiff-Appellant, as owner of the S.S. "IRISH SPRUCE", For exoneration from or limitation of liability.

COMPANIA PERUANA DE VAPORES, S.A.,

Claimant-Appellant,

SPRAGUE & RHODES COMMODITY CORP., et al.,

Claimants-Appellees.

AMERICAN SMELTING AND REFINING COMPANY,

Plaintiff-Appellee,

v.

S. S. IRISH SPRUCE, her engines, tackle, etc., and against IRISH SHIPPING LTD.,

Defendant-Appellant.

Order Denying Petition for Rehearing en Banc.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the Appellees, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,
Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
Irving R. Kaufman, Chief Judge